

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

THOMAS D. SIMPSON,

Petitioner,

v.

**OFFICE OF THE INSURANCE COMMISSION
and INDEPENDENCE COAL COMPANY, INC.,**

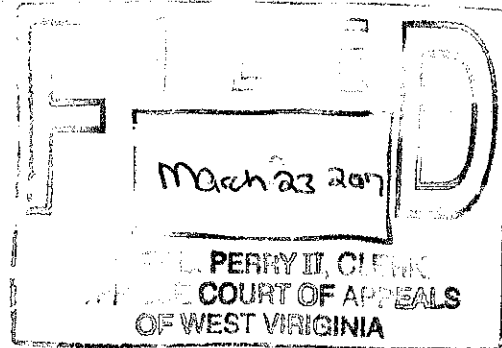
Respondents.

Supreme Court No.: 070520

Appeal No.: 76478

CN: 2003016770

DOI: 9/25/02



**RESPONSE TO PETITION FOR APPEAL
ON BEHALF OF RESPONDENT,
INDEPENDENCE COAL COMPANY, INC.**

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I. NATURE OF PETITION FOR APPEAL

Petitioner, Thomas D. Simpson ("the claimant"), by counsel, has filed a petition for appeal from the Workers' Compensation Board of Review's order dated January 23, 2007, which affirmed the Decision of Administrative Law Judge dated June 22, 2006, which affirmed the Workers' Compensation Commission's order dated March 24, 2005, which granted the claimant a 13% permanent partial disability award for a lower-back injury. Respondent, Independence Coal Company, Inc. ("the employer"), by counsel, hereby requests this Honorable Court to deny the claimant's petition for appeal because 85 C.S.R. § 20-64.2 and Table §85-20-C clearly cap the claimant's permanent partial disability award at 13%. Furthermore, the claimant's argument on appeal that 85 C.S.R. § 20-64.2 is unconstitutional contradicts the claimant's other appellate contention that the claimant is entitled to a 20% permanent partial disability award, based upon 85 C.S.R. §16-4, a rule promulgated in the same manner as 85 C.S.R. § 20-64.2.

II. STATEMENT OF PERTINENT FACTS

The claimant, a coal truck driver, experienced lower-back pain when he slipped while merely exiting a truck on September 25, 2002 (see claimant's Report of Occupational Injury; Petitioner's Appendix at 1). Dr. Mike Kelly of Raleigh General Hospital diagnosed a lumbosacral strain, and other, non-specific conditions (*Id.*).

By order dated October 14, 2002, the Workers' Compensation Commission ("the Commission") ruled the instant claim compensable, and identified as the compensable conditions, the following: other/unspecified injury trunk; disturbance skin sensation; and sprain/strain of the lumbosacral spine.

Dr. Shah Siddiqi, a neurosurgeon, assumed care and treatment of the claimant on or before October 24, 2002, and recommended a right L4-5 microdiscectomy (see Petitioner's Appendix at 68-86). By order dated October 31, 2002, the Commission authorized Dr. Siddiqi to perform a right L4-5 microdiscectomy. Dr. Siddiqi performed this surgical procedure in December 2002 (see Petitioner's Appendix at 68-86).

The Commission, by order dated September 26, 2003, authorized a spinal cord stimulator. According to The Center for Pain Relief's Progress Notes, the claimant's spinal cord stimulator was implanted prior to May 24, 2004 (see Petitioner's Appendix at 109-145).

Dr. George Orphanos examined the claimant at the Commission's request on February 1, 2005, and produced a report of the same date (see Petitioner's Appendix at 146-151). Dr. Orphanos noted that the claimant stood 5' 6" tall, and weighed 215 pounds. In addition, Dr. Orphanos stated that the claimant had sustained a soft-tissue injury to the lumbar spine, which had been superimposed on preexistent degenerative changes at L4-5, and that a herniated disc at L4-5

on the right had developed. Dr. Orphanos added that the claimant had undergone surgery in the form of a hemilaminectomy and discectomy at L4-5, but no additional surgical procedures had been recommended. Finally, Dr. Orphanos rated the claimant's whole-person impairment, as follows:

The patient has an impairment and the AMA Guides, 4th Edition was followed along with Rule 20, Section 7. According to table 85-20-C the patient falls in the lumbar category 3 which will allow 10 to 13% of impairment for the whole person. Concerning range of motion of the lumbar spine as per AMA Guides, 4th Edition, table 81, page 128 for hip flexion angle 10 degrees and true lumbar flexion 10 degrees a 10% impairment is recommended. For true lumbar extension 10 degrees, 5% is recommended. For lateral bending to the right 15 degrees, 2% and to the left 10 degrees 3%. The range of motion impairment will sum up to 20%. The range of motion impairment does not fall within the accepted ranges for this category, therefore, the impairment has been adjusted to 13% pursuant to Rule 20, Section 7. In addition to the above I would like to recommend a 2% of impairment for the last surgical procedure concerning spinal cord stimulator and additional scars. This will bring his impairment to 15% as estimated at this time concerning this claim.

(Id.).

By order dated March 24, 2005, the Commission granted the claimant a 13% permanent partial disability award (see Petitioner's Appendix at 152). The claimant, by counsel, protested the Commission's order dated March 24, 2005.

During protest litigation, claimant's counsel, without notifying employer's counsel, deposed Dr. Orphanos (see the transcript of the September 28, 2005, deposition of George Orphanos, M.D.; Petitioner's Appendix at 160-168). Dr. Orphanos reiterated his examination findings and recommendations during claimant's counsel's unopposed deposition of him on September 28, 2005

(Id.).

By decision dated June 22, 2006, Administrative Law Judge Rebecca S. Charles

affirmed the Commission's order dated March 24, 2005, which granted the claimant a 13% permanent partial disability award (see Petitioner's Appendix at 153-157). Judge Charles ruled, as follows: "It is found that Dr. Orphanos, who recommended 2% additional from the AMA Guides, instead of basing his entire rating upon Rule 20, was not proper. It is found that Dr. Orphanos was, in fact, restricted to the Rule 20 impairment ratings for a lumbar Category III injury. Therefore, it is found that the Commission was correct in granting the claimant 13% based upon Rule 20." (Id.). The claimant, by counsel, filed an appeal from the Decision of Administrative Law Judge dated June 22, 2006.

By order dated January 23, 2007, the Workers' Compensation Board of Review ("the Board of Review") unanimously affirmed the Decision of Administrative Law Judge dated June 22, 2006, which affirmed the Workers' Compensation Commission's order dated March 24, 2005, which granted the claimant a 13% permanent partial disability award for a lower-back injury (see Petitioner's Appendix at 158-159). The claimant, by counsel, has filed a petition for appeal from the Board of Review's order dated January 23, 2007.

III. CONCLUSIONS OF LAW AND CITATION OF AUTHORITIES

1. "If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record."

West Virginia Code § 23-5-15(c) (2005).

2. The Board of Review shall reverse, vacate or modify a decision of an administrative law judge if the substantial rights of the appellant have been prejudiced because the Administrative Law Judge's findings are:

- (1) In violation of statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the Administrative Law Judge; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

West Virginia Code § 23-5-12(b) (2005).

3. "Lumbar Spine Impairment. The range of motion methodology for assessing permanent impairment shall be used. However, a single injury or cumulative injuries that lead to a permanent impairment to the Lumbar Spine area of one's person shall cause an injured worker to be eligible to receive a permanent partial disability award within the ranges identified in Table §85-20-C. The rating physician must identify the appropriate impairment category and then assign an impairment within the appropriate range designated for that category."

85 C.S.R. § 20-64.2.

4. A claimant who meets the impairment criteria set forth in Lumbar Category III is to be assigned a whole-person impairment rating in the 10% to 13% range.

TABLE §85-20-C.

5. A physician who determines the permanent whole-body medical impairment that a claimant has suffered shall do so in accordance with the A.M.A. *Guides to the Evaluation of Permanent Impairment* (4th Ed.).

85 C.S.R. § 16-4.

IV. ARGUMENT

Because the Commission, the Workers' Compensation Office of Judges, and the Board of Review all have found that the claimant has sustained a 13% permanent partial disability, as a result of his compensable lower-back injury, the standard for review applicable to this Honorable Court herein is as follows: "If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record." West Virginia Code § 23-5-15(c) (2005). The Board of Review's order dated January 23, 2007, is not violative of the Constitution or the West Virginia Workers' Compensation Act, does not result from erroneous conclusions of law, and is not based upon the Board of Review's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the claimant's petition for appeal from the Board of Review's order dated January 23, 2007, should be refused.

The Board of Review's order dated January 23, 2007, is valid in all respects. The appellate standard for review applicable to the Board of Review is as follows: The Board of Review

shall reverse, vacate or modify a decision of an administrative law judge if the substantial rights of the appellant have been prejudiced because the Administrative Law Judge's findings are: (1) In violation of statutory provisions; or (2) in excess of the statutory authority or jurisdiction of the Administrative Law Judge; or (3) made upon unlawful procedures; or (4) affected by other error of law; or (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. West Virginia Code § 23-5-12(b) (2005). Moreover, "[f]or all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position." West Virginia Code § 23-4-1g (2003). As the Board of Review correctly has ruled, Judge Charles has rendered a decision consistent with applicable law and a preponderance of the evidence of record, including the valid aspects of Dr. Orphanos' impairment rating. Therefore, the claimant's substantial rights have not been prejudiced by the unanimous rulings rendered below.

**THE BOARD OF REVIEW IS CORRECT THAT
THE CLAIMANT IS ENTITLED TO NO MORE
THAN A 13% PERMANENT PARTIAL
DISABILITY AWARD, PURSUANT TO 85
C.S.R. § 20-64.2 AND TABLE §85-20-C.**

The unanimous finding rendered below that the claimant is entitled to no more than 13% permanent partial disability award for lumbar-spine impairment is clearly correct. Dr. Orphanos is the only physician of record who assesses the level of the claimant's whole-person impairment. Initially, Dr. Orphanos follows applicable law to determine the claimant's whole-person impairment, but, as correctly ruled by Judge Charles, then the Board of Review, strays from such law at the very end of his assessment of such impairment. In determining the whole-person impairment resulting from a compensable lower-back injury, the evaluating physician is to follow the following steps: "Lumbar Spine Impairment. The range of motion methodology for assessing permanent impairment shall be used. However, a single injury or cumulative injuries that lead to a permanent impairment to the Lumbar Spine area of one's person shall cause an injured worker to be eligible to receive a permanent partial disability award within the ranges identified in Table §85-20-C. The rating physician must identify the appropriate impairment category and then assign an impairment within the appropriate range designated for that category." 85 C.S.R. § 20-64.2. Moreover, a claimant who meets the impairment criteria set forth in Lumbar Category III is to be assigned a whole-person impairment rating in the 10% to 13% range. TABLE §85-20-C.

Dr. Orphanos correctly uses the range of motion methodology for assessing the claimant's permanent impairment, and identifies the appropriate impairment category, which is Lumbar Category III. However, Dr. Orphanos errs to the extent that he recommends a whole-person impairment (15%) greater than that to which the claimant is entitled by law. More pointedly, 85 C.S.R. § 20-64.2 requires Dr. Orphanos to assign an impairment within the appropriate range designated in Lumbar Category III, which is as little as 10% impairment, but not greater than 13% impairment. As Judge Charles and the Board of Review properly have ruled, Dr. Orphanos is not

permitted to recommend more than a 13% whole-person impairment for the claimant's lower-back injury, once he has placed such injury in Lumbar Category III.

As an aside, the claimant's verbose argument that 85 C.S.R. § 20-64.2 violates the West Virginia Constitution and his due process rights contradicts his other contention that he is entitled to a 20% permanent partial disability award, pursuant to the Range of Motion Model for determining impairment set forth in A.M.A. *Guides to the Evaluation of Permanent Impairment* (4th Ed.). The rule requiring the evaluating physician to base the claimant's whole-person impairment on the A.M.A. *Guides to the Evaluation of Permanent Impairment* (4th Ed.), upon which the claimant's contention that he is entitled to a 20% permanent partial disability award is based, is the same type of rule that claimant's counsel contends is unconstitutional. More specifically, 85 C.S.R. § 16-4 requires the physician who determines the permanent whole-body medical impairment that a claimant has suffered to do so in accordance with the A.M.A. *Guides to the Evaluation of Permanent Impairment* (4th Ed.). In short, the claimant, by counsel, disingenuously requests this Honorable Court to strike down on constitutional grounds, 85 C.S.R. § 20-64.2, but base his permanent partial disability award on 85 C.S.R. § 16-4, a rule promulgated in the same manner as 85 C.S.R. § 20-64.2.

V. CONCLUSION

The claimant has been awarded the most permanent partial disability (13%) for which he is eligible, pursuant to 85 C.S.R. § 20-64.2 and Table §85-20-C. Moreover, the claimant's contention that 85 C.S.R. § 20-64.2 is unconstitutional contradicts the claimant's other argument that the claimant is entitled to a 20% permanent partial disability award, pursuant to 85 C.S.R. §16-4, a rule promulgated in the same manner as 85 C.S.R. § 20-64.2. Accordingly, the claimant's petition

for appeal from the Board of Review's valid order of January 23, 2007, should be rejected.

Respectfully submitted,

INDEPENDENCE COAL COMPANY, INC.

By Counsel

A handwritten signature in black ink, appearing to read "Sean Harter", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Sean Harter, do hereby certify that a true copy of the foregoing, "Response to Petition for Appeal on Behalf of Respondent, Independence Coal Company, Inc.," was sent this 23rd day of March, 2007, first class U.S. mail, postage prepaid, to each of the following:

State of West Virginia
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Workers' Compensation Claims Defense
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